

Artículo de investigación

The concept of judicial law: Russian context**Концепция судебного права: российский контекст**

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Abstract

The article is devoted to the analysis of approaches to understanding judicial law. The existing diversity of concepts in the Russian legal doctrine can be reduced to two main approaches: judicial law as a branch of unified procedural science and as a complex branch of Russian law. A broad approach to the understanding of judicial law as a single complex of legal phenomena of the legal system is still being formed and underexplored. To overcome the contradictions in the understanding of judicial law in the framework of the study, the authors used a systematic approach, which allows considering judicial law as an integral part of the legal system. Consideration of judicial law as a polysystemic entity forming a part of the legal system allows integrating numerous legal phenomena on ideological, normative, institutional and practical levels. The complex concept of judicial law forms a universal understanding of the judicial power and affirms its special role in society while contributing to overcoming the understanding of justice established in the Soviet doctrine as a form of law enforcement. In the world legal science, a systematic approach to the study of judicial law issues is formed within the framework of the regulatory theory (the concept of a "regulated judge") and is used for the construction of the model of the future court in view of the development of information technologies and artificial intelligence. International organizations actively use the methodology of judicial law as an indicator of the effectiveness of the judicial system. The understanding of judicial law as an independent part of the legal system will allow going beyond the legal system at the national level, based on the monistic theory that considers national and international legal systems as an integral whole and to create a common

Аннотация

Статья посвящена анализу подходов к пониманию судебного права. Существующее многообразие концепций в российской правовой доктрине может быть сведено к двум основным подходам: судебное право как отрасль единой процессуальной науки и как комплексная отрасль российского права. Широкий подход к пониманию судебного права в качестве единого комплекса правовых явлений правовой системы еще только формируется и малоисследован. Для преодоления возникших противоречий в понимании судебного права в рамках исследования использовался системный подход, позволивший рассмотреть судебное право в качестве составной части правовой системы. Рассмотрение судебного права как полисистемного образования, образующего часть правовой системы, позволяет интегрировать ряд правовых явлений на идеологическом, нормативном, институциональном и практическом уровнях. Комплексная концепция судебного права формирует универсальное понимание судебной власти и утверждает ее особую роль в обществе, способствуя преодолению сложившегося в советской доктрине понимания правосудия как одного из видов правоприменения. В мировой правовой науке системный подход к изучению вопросов судебного права формируется в рамках регулятивной теории (концепция «регулируемого судьи») и используется для конструирования модели суда будущего в свете развития информационных технологий и искусственного интеллекта. Международные организации активно используют методологию судебного права в качестве индикатора эффективности

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understanding of judicial law issues at the international level.

Key Words: Court, judicial law, judicial power, justice, procedural law, branch of law, legal system.

судебной системы. Понимание судебного права в качестве самостоятельной части правовой системы позволит не ограничиваться правовой системой национального уровня, основываясь на монистической теории, рассматривающей национальную и международную правовые системы как единое целое, создать единое понимание вопросов судебного права на международном уровне.

Ключевые слова: Суд, судебное право, судебная власть, правосудие, процессуальное право, отрасль права, правовая система.

Introduction

The term "judicial law" is multidimensional and is used by law science and jurisprudence with different meanings. In the countries of the Anglo-Saxon legal system, judicial law is part of the law system created by judicial law-making and established in court rulings (Marchenko, 2017). In the countries of the Romano-German legal family, the term "judicial law" is understood as a collective notion that unites a set of national legal rules regulating relations of the judicial system and judicial proceedings (Neudorf, 2017). At the same time, there is no common understanding of the essence of judicial law and the scope of its content.

International law leaves open the concept of judicial law. Universal international instruments provide general recommendations on the conduct of judges: Basic Principles on the Independence of the Judiciary of 13 December 1985 and others. The issues of judicial procedure and court organization are disclosed separately in relation to each international judicial body acting as the monitoring mechanism of an international treaty. Provisions of the regional international organizations are traditionally limited in nature. Today the leading role in the formation of judicial law at the international level undoubtedly belongs to the European standards of justice established in Article 6 "Right to a fair trial" of the European Convention (Morshchakova, 2012). However, the judicial activism of the European Court of Human Rights in identifying the meaning and further developing the provisions of article 6 of the European Convention on Human Rights has still been controversial, which predetermines difficulties with the implementation of these standards (Chechulina, 2019). These circumstances allow stating that there is still no

single set of universal standards of judicial law at the international level.

Continuously changing social, economic, political and technological realities have prompted new approaches and mechanisms to examine the justice system (Tonn et al, 2012). Decades of modern judicial reform in Russia resulted in the need for a unified theoretical concept of judicial law. Judicial reform can both improve and bring some shortcomings in the regulation of judicial activity (Devlin and Dodek, 2016). To date, there is a state target program for the development of a judicial system in Russia for 2013-2020. Unlike previous programs, the amount of budget allocated for the development of a judicial system has increased to 90 billion rubles. (Federal target program, 2012). However, the effectiveness of judicial reform depends primarily on the essence of the basic concept. The key issue in establishing the effective system of judicial power based on generally accepted international standards of justice can be the universal concept of judicial law, which unites the rules of the court organization and judicial procedure.

To date, there is no uniform approach to understanding the essence of judicial law in legal science and legal practice. Russian legal doctrine contains several approaches to understanding judicial law. The variety of approaches can be reduced to two basic concepts considering judicial law as a branch of unified procedural science and as a complex branch of Russian law. The emerging integrated approach to the understanding of judicial law suggests considering judicial law as a single complex of legal phenomena of the legal system, had not yet been finalized and requires further investigation. The lack of scientific studies of this integrated

approach does not allow including in the orbit of legal regulation several issues necessary for the formation of understanding of judicial law authorities: judicial discretion, judicial rulemaking, judicial awareness and legal culture. The recognition of an integrated approach to judicial law will allow the integration of the main components in the sphere of judicial proceedings and the judicial system at several levels: ideological, normative, institutional and the level of legal practice. The concept of judicial law as part of the legal system, considered in the framework of monistic theory as the unity of international and national legal systems, is capable of managing relations in the sphere of a judicial system and judicial proceedings at the international level.

Methods and objectives of the study.

To overcome the contradictions in the understanding of judicial law, it seems necessary to apply a systematic approach and consider the concept of judicial law as an integral part of the legal system. From the position of system concepts of the theory of law: the system of law and legal system, to identify several levels (sections) of judicial law, within the framework of the global legal system, to establish common standards of judicial law, both for national and international levels. Particular attention should be paid to the comparative law method, using it to compare the content of different approaches to understanding judicial law. The formal-legal method was used for the analysis of universal and regional international instruments in the field of court organization and judicial proceedings.

Purpose of study. The study aims to provide a comprehensive analysis of approaches to the essence of judicial law and the formation of a unified system approach to the understanding of judicial law as part of the legal system.

Subject of study. The key conceptual approaches of Russian pre-revolutionary lawyers on the unified procedural branch of law, perspectives of the modern Russian lawyers on the essence of judicial law, foreign scientific approaches to the basic concepts of judicial power, Canadian scientists' concept of "regulated judges", along with foreign studies on future court models became the subject of this research. The authors also examined reports from international bodies on the evaluation of the efficiency of the national judicial systems: the Report of the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) "European Judicial Systems – Efficiency and Quality of Justice.

Issued in 2018", the global project of the European Network of Judicial Council of the EU "Independence and Responsibility of Judges of the European Union" of 2013, Conclusions of the Advisory Council of European Judges for the Committee of Ministers of the Council of Europe.

Literature review.

1. Judicial law as a branch of unified procedural science

At the beginning of the 20th century, Russian legal scholars formulated the concept of judicial law as an integrating basis of the existing processes (Foyntitskiy, 1910). The scientists have identified four basic elements that are identical for all types of processes: foundation, common goal, principles, means for achieving the objectives (Mikhaylovskiy, 1907). Through the prism of general principles, judicial law was conceived as an independent branch of scientific knowledge, allowing to study on a single basis and improve the existing processes.

In 1920 V.A. Ryazanovskiy completed the concept of judicial law, pointing out that the quintessence of judicial law is ensuring a single universal role of the court in judicial proceedings. "The role of the court, regardless of the process, should remain unified" (Ryazanovskiy, 2005). This principle can ensure equal protection of the rights of individuals.

The idea of unified judicial protection of the rights of individuals, formulated in the classical work of the German legal scholar R. Ihering, justified the position of "unity in a multitude" in which protection was considered uniform in content and "different" in a form (Ihering, 1877). Based on the ideas of R. Ihering, V.A. Ryazanovskiy created the concept of judicial law, based on the uniform institutions of procedural law, aimed at ensuring a unified role of the court and uniform judicial protection. Assessing the place of judicial law concept in the system of legal phenomena allows stating that judicial law was understood as a branch of scientific knowledge.

2. Judicial law as a branch of unified procedural science

Most researchers consider the concept of judicial law as one of the complex branches of law (Litvinova, 2013). The group of Soviet researchers in the monograph "Problems of Judicial Law" (Polyanskiy et al, 1983) were

among the first to propose this approach. According to the authors, judicial law is a secondary complex branch of law, combining the judicial, criminal and civil organization. The group of "coinciding institutions" involved general principles, evidence and evidencing institutions and the institution of procedural relations between the court and the participants in the process.

The classic Russian legal scholar S.S. Alekseev proposed to consider judicial law as the "over-branch" or "super-branch" (Alekseyev, 1975). Judicial law is an "over-branch" emerging over procedural branches of law and judicial law.

In general, judicial law in the Soviet legal doctrine acted as an antipode to the theory of "broad process", asserting the provision of the unified justice as a special procedural activity. Thus, V.M. Savitskii defined judicial law as a set of legal rules regulating social relations that arise in the process of administration of justice (Polyanskiy et al, 1983). At the same time, the theory of broad process equated justice with ordinary law enforcement activities, neutralizing the special role of the court (Ryazanovskiy, 2005; Gus'kova and Muratova, 2005).

3. Judicial law as part of the legal system.

The third approach to understanding the essence of judicial law marks a broad approach defining judicial law as a complex of legal phenomena forming part of the legal system.

Thus, N.V. Vitruk proposed to consider judicial law as a legal complex (family) consisting of several independent branches of law and to include all types of judicial procedure in the complex of the jurisdictional process (Vitruk, 2006). Russian legal scholar E.M. Muradyan rightly points out that the purpose of the judicial law concept is to develop an integrated approach to understanding judicial power. At the same time, "judicial law is a natural phenomenon of the legal system" (Murad'yan, 2007).

Indeed, a broad understanding of judicial law formulates a complex approach to the institution of judicial power and enables the integration of different meanings of judicial law (branch of law, branch of science, branch of legislation, etc.). Thus, the European Commission for the Efficiency of Justice of the Council of Europe considers the need to overcome different meanings, existing in the field of judicial power on the European continent as the main problem

in examining the judicial power in the European continent (Albers, 2008).

However, it appears that the definition of judicial law as a legal complex within the legal system is due not only to the existence of a branch of law and a branch of science but, above all, the existence of judicial discretion and a special judicial awareness enabling the distinction between law and legislation and follows the universal values for the protection of human rights and freedoms.

An integrated approach to the study of judicial law is gradually developing in the foreign legal doctrine. For a long time, most of the studies focused mainly on the analysis of basic values of judicial law: independence and accountability of judges (Van Dijk and Vos, 2018; Karlan, 2007; Tiede, 2006). Particular attention was paid to the dichotomy of these categories and to the central question whether an "accountable judge" can be independent?

Recent studies consider the court as a multidimensional institution of a complex nature. Thus, the comparative legal study of Canadian scientists R. Devlina, A. Dodek, who created the concept of a "regulated judge" based on a systematic approach is of particular interest (Devlin and Dodek, 2016). This concept examines court as a unique structure – a "pyramid", established within the regulatory theory. Basic values form the foundation of the pyramid, its walls correspond to three legal phenomena – judicial procedure, resources ensuring the work of a judicial system, and the results of judicial activity (Neudorf, 2017). Accordingly, the court itself is considered as a complex contextualized structure, including both legal and non-legal rules (moral values, ethical norms, etc.).

The integrated approach is actively used in foreign doctrine to design the model of the future court created in light with the development of artificial intelligence and information technologies (Dator, 2000). Thus, a group of American scientists proposed to study the judicial power from the position of an international virtual process that may not have a territorial link to any state or international organization, and may be governed by various institutional structures (not only by the state but also by non-governmental bodies) and the parties may be granted right to choose the form of the process.

International bodies actively use the integrated approach to the study of judicial law in their research and create systemic categories as indicators of efficiency of the judicial system. Thus, the European Commission on the Effectiveness of the Judiciary of the Council of Europe uses five basic criteria for analyzing the state of the national judicial system: access to justice, the effectiveness of the national judicial system, the use of information technology, fair trial, the openness of information about judges, prosecutors and court lawyers, and the provision of information on bailiffs and the procedure for enforcing the judgement.

Adopted by the UN General Assembly program "Transforming our world: the 2030 agenda for sustainable development", including global goal No.16 "Promoting a fair, peaceful and inclusive society", caused the use of an integrated approach to the research of the national judicial law — "judicial index" (Alekseevskaya & Treskina, 2018). The "judicial index" is based on the analysis of relations in the court organization and judicial procedure through the prism of the primacy of law and accessibility of court.

When conducting a global study of the issues of "Independence and accountability of judges in the European Union" in 2013, the European Network of Judicial Councils of the European Union (ENCJ) applied a multidimensional indicator combining the concepts of judicial independence, judicial accountability, judicial transparency and the institution of trust in the judicial system. At the same time, the concept of judicial accountability mechanism has expanded significantly by incorporating a whole set of elements: the impact of the press on the judicial system, the role of court chairpersons in promoting the career of judges, forced dismissal of judges, etc. (Kosař and Spáč, 2018).

Summing up the theories and approaches examined in this study, it can be concluded that a broad understanding of judicial law as a part of the legal system will go beyond the legal system at the national level (based on the international nature of many relationships that arise in the field of judicial procedure and court organization) and create a unified understanding of judicial procedures and court organization at the international level.

Results and discussion

1. Currently, there are three basic approaches to the understanding of the

essence of judicial law in the Russian legal doctrine:

- 1) As a branch of the united procedural science,
- 2) As a complex branch of Russian law,
- 3) As a legal complex forming part of the legal system.

At the same time, the latter approach is poorly studied and requires further scientific research.

2. Judicial law, considered as part of the legal system, would provide a universal understanding of judicial power and define its special role in society based on the recognition of presumption of legality of judicial discretion and the possibility of distinguishing between law and legislation. This approach is aimed at overcoming the Soviet legal doctrine and the preserved understanding of justice as a type of law enforcement, which neutralizes a particular understanding and the purpose of judicial power.
3. Based on a systematic approach, a broad understanding of judicial law allows integrating the main components of judicial procedure and court organization at several levels: ideological, normative, institutional and practical.
4. In the foreign legal doctrine, the main paradigm of examining judicial law issues is the study of basic values: independence and accountability of judges. The complex approach to the study of judicial law in foreign legal science is formed in the sphere of regulatory theory (the concept of "regulated judge") and is actively used for the construction of the future court model in line with the development of information technologies and artificial intelligence.
5. A broad understanding of judicial law is of great practical importance for the formation of universal concepts and studies at the international and interregional levels. International organizations actively use an integrated approach to the study of judicial law and the formation of a unified understanding of terms in the field of judicial procedure and court organization.
6. The research allows concluding that a broad approach to judicial law, based on the monistic theory of the legal system,

considering the international and national legal system as an integrated whole, would create uniform standards in the sphere of court organization and judicial procedure at the international level.

Conclusions

The recognition of a broad approach to the understanding of judicial law as part of the legal system has an important theoretical and practical significance for the creation of a universal understanding of judicial power, both at the national and international levels.

Further scientific study based on this concept will significantly expand the subject of study by including the issues of judicial discretion, judicial rulemaking, judicial awareness and legal culture in the sphere of legal regulation. Understanding of judicial law as a cross-section of the legal system will allow investigating the ratio of such categories as judicial law and judiciary law, by including the latter in the structure of judicial law as an element of legal practices.

The efficiency of completion of epy modern judicial reform in Russia depends on the "content" of the legal categories, which form the judicial law. Being part of the global legal system, judicial law can be seen as a platform for reconciliation of the national legal systems in the field of judicial procedure and court organization and creating the unified international standards based on the recognition of the specific role of courts in society.

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